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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, in the
interest of C.B., a person
under eighteen years of age

GUARDIAN AD LITEM BRIEF

M.B.,
Appellant,

Appellate Case No: 20120036-CA

vs.

State of Utah,
Appellee

APPEAL FROM A FINAL ORDER
THIRD DISTRICT JUVENILE COURT
THE HONORABLE FREDERIC M. ODDONE PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, in the interest of C.B., a person under eighteen years of age	GUARDIAN AD LITEM BRIEF
M.B., Appellant, vs. State of Utah, Appellee	Appellate Case No: 20120036-CA

JURISDICTION

This Court has jurisdiction over final juvenile orders pursuant to Utah Code Ann. § 78A-4-103(2)(c). The juvenile court entered the termination order December 28, 2011. Mother filed a notice of appeal on January 9, 2012.

QUESTION FOR REVIEW

1. Whether the juvenile court erred in determining Mother need not be competent to participate in the termination trial. Mother preserved this claim.

This issue is one of law, which this Court reviews for correctness. *In re M.J.*, 2011 UT App 398, ¶ 19, 266 P.3d 850.

DETERMINATIVE PROVISIONS

No single provision is determinative, however, as discussed in note one, the entire child welfare code suggests that child welfare procedures are meant to be a specialized form of a competency proceeding where the competence of the parent not assumed, and is in fact the central legal determination.

STATEMENT OF CASE

Mother appeals an order terminating her parental rights to B.C., a seventeen month-old boy born in October 2010. The three month-old Child was removed from a family shelter where he and Mother lived. Exh. 1. The juvenile court adjudicated the Child's status as neglected. Exh. 3. After an evidentiary hearing on the State's termination petition, the court made both oral and written findings terminating Mother's rights on four grounds. Term.Ord. p.12, ¶¶ 1-4; Tr. 112 *et seq.* Mother now appeals the termination order.

RELEVANT FACTS

After B.C.'s October 2010 birth, he and his mother went straight from the hospital to the homeless shelter. Sh.Ord. Exh. 1. Three months later, a shelter resident alerted the Division reporting several sightings of Mother scolding Child, putting her hand or an object over his mouth, squeezing him hard, letting him cry all morning and other signs of abuse and neglect. Adj.Ord., Exh. 3. When a Division caseworker arrived to investigate, Mother claimed the worker was crazy and was trying to harm the baby. *Id.* Eventually, law enforcement had to restrain Mother. *Id.* The Division removed the three month-old Child. *Id.*

The court adjudicated Child as neglected, maintained custody with the Division and allowed Mother two supervised visits per week. Term.Ord. ¶ 13. Initially, Mother's incarceration rendered her unable to visit, but upon release, she waited ten days to request a visit. *Id.* at ¶¶ 7, 17. When she did visit, she showed an inability to care for the Child, even after case worker prompting. *Id.* at ¶ 27. On one visit, Mother made an inappropriate sexual remark to the Child. *Id.* at ¶ 30.

At the May 2011 disposition hearing, the court set a reunification goal and approved a service plan, which Mother refused to sign. 5-10-11 Min. The court ordered a psychological evaluation and set a date for further disposition. *Id.* At the June 30, 2011 disposition, Mother had not yet completed the psychological evaluation. Min. The court ordered her to do so and set another date for further disposition. *Id.* On July 7, 2011, Mother finally completed the psychological evaluation, but failed to attend the August 9, 2011 hearing. Min. Based in part on Mother's disinterest in visits, in learning parenting skills, and in attending court proceedings, the court discontinued further services and visits and scheduled a permanency hearing for later that month. 8-9-11 Min.

On September 8, 2011, the Division filed a termination petition. Counsel for Mother asked that the termination trial be continued so that Mother's competency to stand trial could be assessed. 11-8-11 Mot. After a hearing on the motion, the court denied the motion determining that competency was not required for the termination trial and, even if it were, Mother has shown herself competent to participate in the trial. 12-8-11 Ord.

After an evidentiary hearing, the juvenile court terminated Mother's parental rights on four grounds. Term. Ord. Mother now appeals, raising issues related to her competency claim.

SUMMARY OF ARGUMENT

The right to be tried only when competent stems from a criminal defendant's right to be present at trial. This right does directly translate to a termination proceeding, which is itself a specialized form of a competency hearing, similar to proceedings for involuntary commitment or adult guardianship, or even the criminal competency hearing itself. Child welfare law contemplates that a parent may well not be competent. Making a claim of incompetence to stand trial comes close to conceding the very issue of parental competence. This Court should affirm the termination order.

ARGUMENT

1. A TERMINATION PROCEEDING IS A COMPETENCY HEARING.

Mother claims the court denied her due process when it failed to consider her competency to participate "both during reunification and also for purposes of

court hearings." Mother's Brief at 14. Mother argues that, had her incompetency been known, the court could have ordered medication, counseling or a guardian ad litem.

Competency in criminal context. Due process requires that a criminal defendant be mentally competent to plead guilty and to stand trial. *Drope v. Mississippi*, 420 U.S. 162, 172 (1975). *Jacobs v. State*, 2001 UT 17, ¶ 12, 20 P.3d 382. The law likens being criminally tried while incompetent to being tried in absentia.¹ *Drope*, 420 U.S. at 172.

The Utah codification of this right prohibits trying a criminal defendant "who is incompetent to proceed," with the burden on the proponent to demonstrate incompetency by a preponderance of the evidence. Utah Code Ann. § 77-15-1; Utah Code Ann. § 77-15-5(10). The law deems a criminal defendant as incompetent where his mental disorder or retardation results in "(1) his inability to have a rational and factual understanding of the proceedings against him or of the

¹ Utah law provides that a parent has a duty, but not an absolute right, to be present in child welfare proceedings. *E.g.*, Utah Code Ann. § 78A-6-306(4) (parents shall be present at shelter hearing). *In re M.H.*, 2007 UT App 69 (parents have no absolute right to attend termination proceeding); *In re M.A.V.*, 736 P.2d 1031, 1033 n. 2 (Utah Ct.App.1987) (same).

punishment specified for the offense charged; or (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding." Utah Code Ann. § 77-15-2. Obviously, the defendant need not be competent to proceed in the competency proceeding itself, nor is his competence assumed.

If an analogy to criminal proceedings is to be made to a termination proceeding, the appropriate analogy would be to the criminal competency itself rather than to the underlying criminal proceeding because the central determination in both contexts is a determination of competence, albeit with different definitions of competence: a criminal defendant's competence to proceed versus a respondent's competence parent. Even so, it is difficult to imagine a situation where a person would meet the criminal definition of incompetence, but not the child welfare definition of incompetence. Thus, to concede incompetence in the child welfare context is to concede the parental competency case against the parent.² *E.g.*, *In re J.J.*, 2011 UT App 395, ¶ 5, 265 P.3d 846 (mother's mental

² Even so, counsel would be bound by professional rules governing attorneys whose clients have diminished capacity. Utah Code Jud. Admin, Rules Prof. Cond. 1.14.

health is evidence of unfitness); *In re G.R.*, 2008 UT App 265 ¶ 2, 191 P.3d 1241 (mental illness no defense to unfitness).

Child welfare law and procedure contemplates that a parent may not be competent. Similar to involuntary commitment proceedings and adult guardianship proceedings and even the criminal competency proceeding itself, child welfare proceedings contemplate that a parent may not be competent because competency itself is the central issue.³ Utah Code Ann. § 62A-15-628; Utah Code

³ The juvenile code and juvenile rules contemplate that the parent may not be mentally competent. *E.g.*, Utah Code Ann. § 78A-6-302(1)(f) (court may order protective custody of child upon finding **institutionalized** parent has not arranged proper care for child); Utah Code Ann. § 78A-6-302(3)(b) (court may not order removal solely on basis of parent's **mental illness**); Utah Code Ann. § 78A-6-306(9)(a)(vii) (at shelter hearing court shall order release of child unless a parent is **institutionalized** and has not arranged for appropriate care); Utah Code Ann. § 78A-6-312(21)(b) (presumption against reunification services where "parent is suffering from a **mental illness** of such magnitude that it renders the parent incapable of utilizing reunification services"); Utah Code Ann. § 78A-6-312(6)(a) (court shall order services to **institutionalized** parent unless determined detrimental to child); Utah Code Ann. § 78A-6-312(25) (time lines for services apply to **institutionalized** parents); Utah Code Ann. § 78A-6-324 (provisions for appointing mental health practitioner to evaluate or provide **mental health** services); Utah Code Ann. § 78A-6-503(2) (where parent is found **incompetent**, court shall then consider child's best interests); Utah Code Ann. § 78A-6-506(3) (proceedings are civil, court to consider parents **competence**); Utah Code Ann. § 78A-6-507(1)(c) (grounds for termination includes **incompetence**); Utah Code Ann. § 78A-6-508(2)(a) (court to consider **mental illness or deficiency** in determining whether parent is unfit or neglectful); Utah Code Ann. § 78A-6-515(1) (provisions for appointing **mental health** practitioner); Utah R. Juv. P. 2

Ann. § 77-5-301. Such proceedings are in fact competency proceedings, although the competency at issue is competence to parent rather than competence to stand trial. Juvenile Rule 2 provides that the civil rules of procedure apply "unless inconsistent with these rules." Utah R. Juv. P. 2(a). Thus, the civil rule 17 requirement that incompetent persons be represented by a general guardian or guardian ad litem is inconsistent, and thus superceded by the juvenile rules and code listed in note one.

This is not to say that an incompetent parent's rights are not protected. Indeed, a juvenile court is a specialized court where the judge is deemed to have knowledge, experience and training in matters going to parental competency. *In re T.M.*, 2006 UT App 435, ¶ 14, 147 P.3d 529 (juvenile court's special training, experience and interest in field). Likewise, the juvenile code and rules provide protections and procedures for parents including appointment of counsel, the opportunity to be heard, multiple levels of hearings and reviews and an adjudicatory standard of clear and convincing evidence. *E.g.*, Utah Code Ann. § 78A-6-304 (shelter hearing procedures); Utah Code Ann. § 78A-6-310 (parent's right to counsel); Utah Code Ann. § 78A-6-311(1) (clear-and-convincing

(a)(2) (court may order pre-adjudication **mental health** examination of parent where mental condition a factor in alleged abuse, neglect or dependency).


adjudicatory standard). Likewise, counsel is bound by professional rules governing attorneys whose clients have diminished capacity. Utah Code Jud. Admin, Rules Prof. Cond. 1.14.

Finally, Mother's request to stay proceedings until she can be found competent undermines child welfare policy of swift permanency, which policy is all the more urgent when a child's parent is incompetent. *In re D.H.*, 2006 UT App 236, ¶ 3; Utah Code Ann. § 78A-6-503(2) (once parent is found incompetent, court required to place child's interests of paramount importance). In other words, Mother's argument is akin to a defendant asking the court to delay an involuntary commitment proceeding until respondent is mentally competent.

CONCLUSION

A parent's past and current mental competence is an essential element of a termination proceeding and not a reason to delay the proceeding itself. The juvenile court did not err in declining to continue the termination trial. This Court should therefore affirm the termination order.

DATED this 20th day of March, 2012.



Martha Pierce
Guardian Ad Litem

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response to Petition of Appeal was mailed by first-class mail on this the 20th day of March, 2012, to the following:

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